FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

P.L. 95–511, see page 92 Stat. 1783

Senate Report (Judiciary Committee) No. 95–604 (I and II), Nov. 15, 22, 1977 [To accompany S. 1566]

Senate Report (Intelligence Committee) No. 95–701, Mar. 14, 1978 [To accompany S. 1566]

House Report [Intelligence Committee) No. 95–1283, June 8, 1978 [To accompany H.R. 7308]

House Conference Report No. 95–1720, Oct. 5, 1978 [To accompany S. 1566]

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DATES OF CONSIDERATION AND PASSAGE

Senate April 20, October 9, 1978

House September 7, October 12, 1978

The Senate bill was passed in lieu of the House bill. The Senate Reports (this page, p. 3970, p. 3973) and the House Conference Report (p. 4048) are set out.

SENATE REPORT NO. 95–604—PART 1

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The Committee on the Judiciary, to which was referred the bill (S. 1566) to amend title 18, United States Code, to authorize applications for a court order approving the use of electronic surveillance to obtain foreign intelligence information, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

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PURPOSE OF AMENDMENTS

The amendments to S. 1566 are designed to clarify and make more explicit the statutory intent, as well as to provide further safeguards for individuals subjected to electronic surveillance pursuant to this new chapter. Certain amendments are also designed to provide a detailed procedure for challenging such surveillance, and any evidence derived therefrom, during the course of a formal proceeding.

Finally, the reported bill adds an amendment to Chapter 119 of title 18, United States Code (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90–351, section 802). This latter amendment is technical and conforming in nature and is designed to integrate certain provisions of Chapters 119 and 120. A more detailed explanation of the individual amendments is contained in the section-by-section analysis of this report.

may only be used in a criminal proceeding with the advance authorization of the Attorney General. This provision is designed to eliminate circumstances in which a local prosecutor has no knowledge that evidence was obtained through foreign intelligence electronic surveillance. In granting approval of the use of the evidence the Attorney General would alert the prosecutor to the surveillance and he, in turn, would alert the court in accordance with subsection (c).

Subsections (c), (d) and (e) set forth the procedures under the bill whereby information acquired by means of electronic surveillance may be received in evidence or otherwise used or disclosed in any trial, hearing or other Federal or State proceeding. Although the primary purpose of electronic surveillance conducted pursuant to this chapter will not be the gathering of criminal evidence, it is contemplated that such evidence will be acquired and this subsection and the succeeding one establish the procedural mechanisms by which such information may be used in formal proceedings.

At the outset the committee recognizes that nothing in subsection (c) abrogates the rights afforded a criminal defendant under *Brady* v.

[54] *United States* v. *Armocida*, 515 F. 2d 29 (3rd Cir. 1975).

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Maryland,[55] and the Jencks Act.[56] These legal principles inhere in any such proceeding and are wholly consistent with the procedures detailed here. Furthermore, nothing contained in this section is intended to alter the traditional principle that the Government cannot use material at trial against a criminal defendant, and then withhold from him such material at trial.[57]

Subsection (c) states that no information acquired pursuant to this chapter may be used unless, prior to the trial, hearing, or other proceeding, or at a reasonable time prior to an effort to disclose the information or submit it in evidence, the government notifies the court that such information was acquired by means of electronic surveillance conducted pursuant to this chapter. This provision has been broadened in S. 1566 over its counterpart in S. 3197 by including non-judicial proceedings. In instances in which the government intends to disclose surveillance information in such a non-judicial forum, subsection (c) would require that the United States district court in the district in which the disclosure is to take place be notified of the proposed disclosure or use.

Subsection (d) parallels 18 U.S.C. 2518(10)(a) and provides a separate statutory vehicle by which a person who has been a subject of electronic surveillance and against whom evidence derived therefrom is to be or has been introduced or otherwise used or disclosed in any trial, hearing or proceeding may move to suppress the contents of any communication acquired by, or evidence derived from, such electronic surveillance. The grounds for such a motion would be that (a) the communication was unlawfully acquired, or (b) the surveillance was not made in conformity with the order of authorization or approval.

The "subject" of electronic surveillance means an individual who was a party to the intercepted communication or was a person against whom the interception was directed. Thus the word is defined to coincide with the definition of "aggrieved person" in section 2510 of title III.[58]

One situation in which such a motion might be presented would be that in which the court orders disclosed to the party the court order and accompanying application under subsection (e) prior to ruling on the legality of the surveillance. Such motion would also be appropriate, however, even after the court's finding of legality if, in subsequent trial testimony, a Government witness provides evidence that the electronic surveillance may have been authorized or conducted in violation of the court order. The most common circumstance in which such a motion might be appropriate would be a situation in which a defendant queries the government under 18 U.S.C. 3504 and discovers that he has been intercepted by electronic surveillance even before the government has decided whether evidence derived from that surveillance will be used in the presentation of its case. In this instance, under the appropriate factual circumstances, the defendant might move to suppress such evidence under this subsection even without having seen any of the underlying documentation.

[55] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).
[56] 18 U.S.C. 3500 et seq.
[57] *United States v. Andolschek*, 142 F. 2d 503 (2nd Cir. 1944).
[58] See also, *Alderman v. United States*, 394 U.S. 165 (1967).

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A motion under this subsection shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the movant was not aware of the grounds for the motion. the only change in subsection (d) from S. 3197 is to remove as a separate, independent basis for suppression the fact that the order was insufficient on its face. This is not a substantive change, however, since communications acquired pursuant to an order insufficient on its face would be unlawfully acquired and therefore subject to suppression under paragraph (1).

Subsection (e) states in detail the procedure the court shall follow when it receives a notification under subsection (c) or a suppression motion is filed under subsection (d). This procedure applies, for example, whenever an individual makes a motion pursuant to subsection (d) or 18 U.S.C. 3504, or any other statute or rule of the United States to discover, obtain or suppress evidence or information obtained or derived from electronic surveillance conducted pursuant to this chapter (for example, Rule 12 of the Federal Rules of Criminal Procedure). Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure "notwithstanding any other law" that must be used to resolve the question. The Committee wishes to make very clear that the procedures set out in subsection (e) apply whatever the underlying rule or statute referred to in the motion. This is necessary to prevent the carefully drawn procedures in subsection (e) from being bypassed by the inventive litigant using a new statute, rule or judicial construction.

The special procedures in subsection (e) cannot be invoked until they are triggered by a Government affidavit that disclosure or an adversary hearing would harm the national security of the United States. If no such assertion is made, the Committee envisions that mandatory disclosure of the application and order, and discretionary disclosure of other surveillance materials, would be made to the defendant, as is required under Title III.[59] When the procedure is so triggered, however, the Government must make available to the court a copy of the court order and accompanying application upon which the surveillance was based.

The court must then conduct an *ex parte*, *in camera* inspection of these materials as well as any other documents which the Government may be ordered to provide, to determine whether the surveillance was authorized and conducted in a manner which did not violate any constitutional or statutory right of the person against whom the evidence is sought to be introduced. The subsection further provides that in making such a determination, the court may order disclosed to the person against whom the evidence is to be introduced the court order or accompanying application, or portions thereof, or other materials relating to the surveillance, only if it finds that such disclosure is necessary to make an accurate determination of the legality of the surveillance. Thus, this subsection deals with the procedure to be followed by the trial court in determining the legality (or illegality) of the surveillance.

The question of how to determine the legality of an electronic surveilance conducted for foreign intelligence purposes has never been

[59] 18 U.S.C. 2518 (9) and (10).

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decided by the Supreme Court. As Justice Stewart noted in his concurring opinion in *Giordano* v. *United States*, "Moreover, we did not in *Alderman*, *Butenko* or *Ivanov*, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination [of legality.]" 394 U.S. 310, 314 (1968); see also, *Taglianetti* v. *United States*, 394 U.S. 316 (1968).[8] The committee views the procedures set forth in this subsection as striking a reasonable balance between an entirely *in camera* proceeding which might adversely affect the defendant's ability to defend himself, and mandatory disclosure, which might occasionally result in the wholesale revelation of sensitive foreign intelligence information.

The decision whether it is necessary to order disclosure to a person is for the court to make after reviewing the underlying documentation and determining its volume, scope and complexity. The committee has noted the reasoned discussion of these matters in the opinion of the Court in *United States* v. *Butenko*, *supra*. There, the court, faced with the difficult problem of determining what standard to follow in balancing national security interests with the right to a fair trial stated:

> The distinguished district court judge reviewed *in camera* the records of the wiretaps at issue here before holding the surveillances to be legal . . . Since the question confronting the district court as to the second set of interceptions was the legality of the taps, not the existence of tainted evidence, it was within his discretion to grant or to deny Ivanov's request for disclosure and a hearing. The exercise of this discretion is to be guided by an evaluation of the complexity of the factors to be considered by the court and by the likelihood that adversary presentation would substantially promote a more accurate decision. (494 F. 2d at 607)

Thus, in some cases, the court will likely be able to determine the legality of the surveillance without any disclosure to the defendant.